

## Gross negligence manslaughter on the cusp: the unprincipled privileging of harm over culpability

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### Abstract:

*Despite playing a significant role in defining the boundaries of manslaughter, the 'gross negligence' concept is notoriously indeterminate. There is no comprehensible and consistent means of measuring whether conduct is sufficiently gross to warrant criminal conviction. The gross negligence condition also sets the culpability bar too low by permitting the criminal censure of undeserving defendants who did not advert to any risk of death associated with their conduct. Whilst acknowledging the difficulties of distinguishing advertence from inadvertence in cases that straddle the margins of legitimate criminal punishment and accidental death, it is argued that punishment should only be meted out to those who are consciously aware, or at least had a conscious inkling, of the risk of encroaching on the victim's legally protected interests. A reformulated offence that regards the defendant's conscious choices as the true determinant of culpability is theoretically plausible and would inject the clarity, certainty and consistency that is required of a law that dictates the parameters of a serious homicide offence.*

### Introduction:

The recent conviction for gross negligence manslaughter of optometrist Honey Rose<sup>1</sup> raises questions about the proper scope of the offence and brings the lower limits of manslaughter back into the academic spotlight. The optometrist failed to notice obvious abnormalities in her eight year-old patient's eyes which should have triggered an urgent referral that would likely have averted his death. Her conduct was described by the sentencing judge as an 'isolated lapse' against a background of 'considerable experience without complaint or criticism.'<sup>2</sup> It was also acknowledged that she was 'in every sense a good person and citizen,' a diligent and devoted optometrist, wife and mother, who had shown deep remorse over the tragic incident.<sup>3</sup> Yet it was established that the performance of a proper internal examination, or at least an examination of available retinal images, is a 'core competency' for any optometrist, and thus Rose's conviction for gross negligence manslaughter was defended on the basis that her conduct 'fell a very long way short'<sup>4</sup> of expected professional standards.

The case reignites debate about the theoretical and practical challenges presented by gross negligence manslaughter, an offence which has been invariably criticised by academics as 'something of a dog's breakfast'<sup>5</sup> and an exhibition of the 'common law at its worst.'<sup>6</sup> The facts provide a poignant reminder of the difficulties of achieving true justice in manslaughter cases that test the boundaries of criminality. But whilst the death resulting from the accused's conduct in such cases is indisputably regrettable, the current offence formulation prioritises the resulting harm (death) over the apposite apportioning of blame on the basis of a defensible theoretical rationale. The consequence of harm alone does not compel a criminal conviction and the unprincipled privileging of harm over culpability<sup>7</sup> has resulted in a poorly

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<sup>1</sup> R v Honey Rose (unreported), Ipswich Crown Court, 26<sup>th</sup> August 2016, Sentencing Remarks of Stuart-Smith J.

<sup>2</sup> Ibid. at para 15.

<sup>3</sup> Ibid. at para 17.

<sup>4</sup> Ibid. at para 14.

<sup>5</sup> M. Moore and H. Hurd, 'Punishing the Awkward, the Stupid, the Weak and the Selfish: The Culpability of Negligence' (2011) 5 *Criminal Law & Philosophy* 147, 192.

<sup>6</sup> D. Baker, *Glanville Williams: Textbook of Criminal Law* 4<sup>th</sup> edn (Sweet & Maxwell, 2015) 512.

<sup>7</sup> Husak remarks that 'the penal law seems to be concerned about negligence only when harm actually occurs,' see D. Husak 'Negligence, Belief, Blame and Criminal Liability: The Special Case of Forgetting' (2011) 5 *Criminal Law & Philosophy* 199, 202.

defined serious homicide offence which leaves much to the discretion of the jury, is 'incapable of any objective and fair measurement'<sup>8</sup> and needs further judicial or legislative attention.<sup>9</sup>

Among the reasons for academic condemnation of the offence are the significant difficulties generated by the requirement that the defendant owes the victim a duty<sup>10</sup> and the causation criterion.<sup>11</sup> Whilst acknowledging the highly controversial nature of both of these requirements, which have, in turn, provoked a wealth of academic debate in recent years, this discussion will focus on the equally contentious but pivotal fault requirement of 'gross negligence'. An unsustainable lack of clarity and certainty permeates this central concept: it will be argued that the nebulous notion of gross negligence is simply too broad to be a defensible standard of criminal culpability, capturing as it does such divergent degrees of fault. It is proposed that the offence boundaries must be redrawn in order to ensure the lower limits of manslaughter are defined with greater precision to withstand damaging claims of uncertainty and to ensure that only those whose conduct is deserving of state censure are punished. In order to achieve this aim, it is advocated that an actor can only have their right to liberty legitimately curtailed by penal sanction when they have consciously chosen to harm or risk causing harm to others. It is acknowledged that more extensive academic debate is required to thrash out the complex theoretical and practical issues entailed by a shift in the lower boundaries of manslaughter. The more modest aim of this discussion is to outline some intractable problems with the existing law in order to strengthen the case for the abolition of gross negligence manslaughter and to engender support for the restatement of subjective recklessness as the benchmark of criminal liability for manslaughter.

### **Gross negligence manslaughter in context:**

In order to set the scene for the proceeding discussion, it is important to consider the precarious but significant position occupied by the existing gross negligence manslaughter offence within the ladder of homicide offences. The term 'involuntary manslaughter' refers to a broad category of unlawful but unintentional killings in which the accused's level of fault may vary dramatically.<sup>12</sup> At one extreme a defendant who has subjective foresight of a risk of death or serious injury<sup>13</sup> may fall within its bounds, along with those who commit certain unlawful and dangerous acts which result in unintended death.<sup>14</sup> At the lower end of the homicide hierarchy sits the offence of gross negligence manslaughter which marks the borderline between manslaughter, one of the most serious criminal offences, and accidental death. It follows that the correct positioning of the lower manslaughter boundary is hugely significant for the individual defendant whose guilt or innocence is determined by it.<sup>15</sup>

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<sup>8</sup> O. Quick, 'Prosecuting 'Gross' Medical Negligence: Manslaughter, Discretion, and the Crown Prosecution Service' (2006) 33 (3) *Journal of Law and Society* 421, 421.

<sup>9</sup> The Law Commission are generally supportive of the retention of gross negligence manslaughter, either in its current form, see *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006), or in the guise of 'killing by gross carelessness,' see *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No 237, 1996).

<sup>10</sup> A. Ashworth, 'Manslaughter by Omission and the Rule of Law' (2015) 8 *Criminal Law Review* 563; C. Elliott, 'Liability for Manslaughter by Omission: Don't Let the Baby Drown' (2010) 74(2) *Journal of Criminal Law* 163; G. Williams, 'Gross negligence manslaughter and duty of care in 'drugs' cases: R v. Evans' (2009) 9 *Criminal Law Review* 631; J. Herring and E. Palser, 'The duty of care in gross negligence manslaughter' (2007) *Criminal Law Review* 24.

<sup>11</sup> R. Williams, 'Policy and Principle in Drugs Manslaughter Cases' (2005) 64(1) *Cambridge Law Journal* 66; J. Horder and L. McGowan, 'Manslaughter by causing another's suicide' (2006) 12 *Criminal Law Review* 1035.

<sup>12</sup> Quick refers to this category of offence as a 'diverse collection of unintentional killings,' see Quick, above n.8 at 422.

<sup>13</sup> Falling short of foreseeing death or grievous bodily harm as a virtually certain consequence of their action, which satisfies the minimum fault requirement for a murder conviction, see *R v Woollin* [1999] 1 AC 82.

<sup>14</sup> Subject to the satisfaction of the offence requirements set out in Attorney General's Reference (No.3 of 1994) [1998] AC 245 at 274.

<sup>15</sup> It also has important ramifications for the relationship between criminal and civil liability generally, see G. Virgo, 'Back to Basics: Reconstructing Manslaughter' (1994) 53 *Cambridge Law Journal* 44, 44.

It is an unfortunate consequence of human failure that sometimes death is caused by defendants in pursuit of activities that are intrinsically lawful and, following the imposition of a gross negligence manslaughter charge, the jury is tasked with filtering out those failures deserving of criminal sanction.<sup>16</sup> Prosecutions often arise in circumstances where the accused is acting with lawful motivation whilst performing a task of, *prima facie*, social utility; the case of Honey Rose is an illustrative example. Whilst the offence is frequently invoked in respect of defendants who have performed jobs incompetently where those tasks required special skill or care, it also extends to ordinary people who have carried out lawful activities ineptly, for whatever reason.<sup>17</sup> Taking into account the potential reach of the existing offence with regard to the range of killings that could fall within its parameters, and bearing in mind the earlier assertion that the offence marks the borderline between accidental killing and a serious homicide conviction, citizens are entitled to expect the offence requirements to be defined with precision and applied with consistency.<sup>18</sup> With these legitimate expectations in mind, the conditions of the offence will now be considered.

### **The offence requirements:**

The origins of the current gross negligence manslaughter offence can be traced to the case of *Bateman*,<sup>19</sup> in which Lord Hewart CJ made the following influential statement:<sup>20</sup>

*To support an indictment for manslaughter the prosecution must prove...that the negligence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.*

Following a relatively brief foray into the realm of objective reckless manslaughter by the House of Lords in *Seymour*<sup>21</sup>, manslaughter by gross negligence was reinstated in the leading case of *Adomako*.<sup>22</sup> Lord Mackay LC established the governing principles which have subsequently dictated the scope of liability for gross negligence manslaughter:<sup>23</sup>

*...[T]he ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.*

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<sup>16</sup> In order to reflect the context in which death may arise from otherwise legitimate activity, a number of specific offences have been created, such as causing death by dangerous driving (Road Traffic Act 1988, s.1) and corporate manslaughter (Corporate Manslaughter and Corporate Homicide Act 2007, s.1). Although the gross negligence manslaughter offence is broad enough to sweep up at least some of this activity, Clarkson contends that it is rare, from a statistical standpoint, for deaths caused either by a corporation or by an individual on the road to be processed on the basis of a manslaughter charge, see CMV Clarkson, 'Context and Culpability in Involuntary Manslaughter: Principle or Instinct' in A. Ashworth and B. Mitchell (eds.), *Rethinking English Homicide Law* (OUP: London, 2000) 133. The present concern is not to debate the moral distinctions captured by these separate offences but to question the scope of the gross negligence manslaughter offence.

<sup>17</sup> See Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, above n.9 at para. 2.8.

<sup>18</sup> Indeed, Article 7 of the European Convention on Human Rights guards against punishment without law.

<sup>19</sup> *R v Bateman* (1925) 19 Cr App R 8.

<sup>20</sup> *Ibid.* at 13.

<sup>21</sup> *R v Seymour* [1983] 2 AC 493; see note 46 (below) for an explanation of objective recklessness.

<sup>22</sup> *R v Adomako* [1995] 1 AC 171

<sup>23</sup> *Ibid.* at 187.

In short, the defendant must be in breach of a duty (determined on the basis of the ordinary principles of negligence), the negligence must cause the death of the victim, and the negligence must, in the opinion of the jury, amount to gross negligence. In terms of the grossness and criminality of the negligence, the jury must decide, having regard to the risk of death involved, whether the conduct of the accused was so bad in the circumstances to warrant a criminal conviction.<sup>24</sup> The following analysis highlights an unsustainable lack of clarity besetting the central offence criterion of 'gross negligence,' which in turn raises questions about the reach of the existing criminal prohibition.

### **What exactly is 'gross negligence'?**

In the criminal context negligence requires unreasonable risk-taking; beyond this basic proposition there is substantial disagreement about the meaning of gross negligence and the offence is challengeable on the basis that its requirements are ill-defined, too broad in scope and, as a consequence, inconsistently applied. The first criticism derives from that fact that there is no clear and consistent method of determining the 'grossness' of the negligence, a task which is left entirely to the jury. The second complaint concerns the unacceptably broad reach of the offence, which has become something of a dumping ground for defendants displaying vastly differing degrees of fault in respect of the deaths they have caused. These familiar concerns will be addressed briefly below in order to highlight some significant problems with the interpretation, application and scope of the existing offence conditions.

#### *Determining the 'grossness' of the negligence:*

The leading authorities dictate that the central requirement of gross negligence is to be determined by the jury whose role it is to decide whether the conduct of the accused is so bad as to warrant a criminal conviction for manslaughter.<sup>25</sup> It is clear that the obligation to establish negligence of a sufficiently serious degree is a judicially developed safeguard to ensure that there is some distinction between the imposition of civil liability for negligence and criminal liability for manslaughter, the latter justifiably requiring a higher degree of fault. In deciding criminal guilt, the jury will make an assessment of the badness of the conduct, taking into account all of the circumstances of the accused and considering how far the conduct fell below the standard expected of the reasonable person in the accused's position.<sup>26</sup> This evaluative exercise raises significant doubts about the role of the jury, the potential for inconsistent verdicts, and the desirability of establishing liability for such a stigmatic offence on the basis of an objective evaluation of the reasonableness of the defendant's conduct.

One reason for such criticism is a legitimate concern about the requisite grossness being determined by reference to how far the conduct fell below the standard expected of the reasonable person in the accused's position. The test necessitates an objective evaluation of the accused's conduct that requires an all-things-considered appraisal, rather than an agent-specific judgement which is exclusively concerned with the defendant's subjective thoughts and beliefs. The elusive 'reasonable person' concept has proven famously difficult to define<sup>27</sup> and consequently a test which is 'cut loose from the alternative moorings of the actor's actual beliefs of the world as it really was at the time the actor acted'<sup>28</sup> seems somewhat futile. This reasonable person construct is consequently derided for being unprincipled, vague and morally arbitrary. Its arbitrariness is demonstrated by the fact that it evades clear definition and consequently jury evaluations of 'reasonableness' are insurmountably difficult.

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Although a valiant attempt is made by P. Westen, 'Individualizing the Reasonable Person in Criminal Law' (2008) 2(2) *Criminal Law and Philosophy* 127.

<sup>28</sup> L. Alexander and K. Kessler Ferzan *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, 2009) 83.

Not only does the jury play a significant role in deciding whether the actor's conduct departed from the standards expected of a reasonable person in the accused's position, they must also determine whether the departure was sufficiently serious to legitimise the resulting punishment. The substantial role played by the jury in determining the outcome of gross negligence manslaughter cases is not problematic for some commentators. Gardner acknowledges that a reduction in appeals could be the likely consequence of heavy reliance of the jury on the basis that juries are legitimately applying their own standards, making their decisions less susceptible to challenge.<sup>29</sup> It is also contended that giving the task of deciding criminality to the jury often relieves judges of the need to formulate opinions on 'politically contentious considerations,' such as where the blame truly rests in difficult cases involving incompetent doctors who have caused the death of patients against a background of broader failings on the part of the National Health Service.<sup>30</sup> Yet the judicial technique of leaving to the jury such important matters as the grossness of the conduct of an actor accused of manslaughter has been described as a 'major weakness' of the offence.<sup>31</sup> Requiring the jury to determine liability for homicide on the strength of nothing more than an intuition that the accused's conduct was bad enough to warrant it provokes the justifiable criticism that the test for gross negligence is circular.<sup>32</sup> The law effectively requires jurors to determine the parameters of the offence: 'it is a crime if the jury think it *ought* to be a crime.'<sup>33</sup> They are asked to determine the boundaries of the manslaughter offence not by reference to any concrete measure of seriousness but on the basis of their individual social and moral perceptions of whether the actor deserves criminal punishment.<sup>34</sup> The potential for these individualised notions of justice to produce inconsistent verdicts is troublesome since it is inevitable that 'different attitudes may be applied to different defendants'<sup>35</sup> in determining the outcome of each case.

Concerns that the test for gross negligence undermines the pursuit of consistency and certainty in the criminal law were aired in the Court of Appeal case of *Misra*.<sup>36</sup> The facts of the case are well-known: two senior house officers were convicted of the gross negligence manslaughter of a 31-year-old patient who died from toxic shock syndrome following a routine knee operation. The doctors had failed to administer appropriate care which could have prevented the patient's death. On appeal the doctors argued that the gross negligence manslaughter offence was incompatible with their human rights.<sup>37</sup> They argued that the fair trial process was undermined by juries effectively determining questions of law yet not being required to provide reasons for their decisions, and that the lack of clear definition of the central requirement of gross negligence - which results in juries having to determine the criminality of the conduct in question - breached principles of legality and transparency.<sup>38</sup> In short, the actor does not know if their conduct is considered criminal until the jury have so decided. The Court of Appeal swiftly dismissed both of these challenges, concluding (rather

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<sup>29</sup> S. Gardner, 'Manslaughter by gross negligence' (1995) 111 *Law Quarterly Review* 22, 26.

<sup>30</sup> Ibid.

<sup>31</sup> See Virgo, above n.15 at 49, and Gardner, above n.29 at 26. The participation of peers in the process of determining the correct boundaries of such an important offence is also regarded by some as the 'only feasible basis' for the determination of guilt, see Law Commission, *Involuntary Manslaughter* (Law Com CP No 135, 1994) para 5.64.

<sup>32</sup> Indeed, Lord Mackay acknowledged the circularity of the test in *Adomako*, above n.22 at 187, but he did not perceive this circularity as 'fatal.'

<sup>33</sup> O. Quick, 'Medicine, Mistakes and Manslaughter: A Criminal Combination' (2010) 69(1) *Cambridge Law Journal* 186, 189.

<sup>34</sup> See A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* 3<sup>rd</sup> edn (Cambridge University Press, 2014) 84-85.

<sup>35</sup> See Gardner, above n. 29.

<sup>36</sup> *R v Misra and Srivastava* [2005] 1 Cr App R 21.

<sup>37</sup> Protected by the European Convention on Human Rights, incorporated into English law by the Human Rights Act 1998.

<sup>38</sup> In contravention of the Article 7 protection against punishment without law.

unpersuasively) that in deciding whether the '[defendant's] behaviour was grossly negligent and consequently criminal' juries are deciding questions of fact, not law,<sup>39</sup> and that Article 7, permits a degree of vagueness, requiring only that the law is defined with *sufficient* precision. It is respectfully submitted that neither of these arguments overcomes the substantial definitional challenges presented by the current formulation of the manslaughter offence, which is determined by nebulous and far-reaching conditions that preclude consistent application.

It seems that, despite any perceived advantages of juries determining the censorious nature of the negligent conduct, there is, inevitably, no discernible benchmark against which the value judgements of jurors are measured other than some vague notion of each individual juror's sense of how bad a defendant's conduct was and how far it departed from expected standards. In order to achieve the definitional clarity and certainty that the law of homicide should demand, reliance on such imprecise evaluations of criminal conduct should be abandoned; the offence should be predicated on a more concrete assessment of criminal guilt which would promote greater consistency and certainty. Adopting subjective recklessness as the fault standard for manslaughter would achieve this much-needed clarity.

### **The relevance of state of mind: determining the fault standard for manslaughter**

In order to strengthen the case for subjective reckless manslaughter it is argued below that, as well as being a slippery concept for juries to determine, the existing fault requirement of gross negligence is over-inclusive, capturing defendants who did not consciously advert to the potential risk of infringing the rights of the victim. Since the very inception of the offence judicial deference to the sweeping gross negligence concept as the baseline for a manslaughter conviction perhaps reveals an unwillingness to explore the difficult relationship between advertence (recklessness) and inadvertence (negligence) in any particular detail.<sup>40</sup> Careful scrutiny of the notions of advertence and inadvertence is, however, required before a redrawing of the boundaries of culpability can be attempted.

#### *An over-inclusive fault standard:*

Uncertainty regarding the requisite fault condition for gross negligence manslaughter offence was apparent from its origination. In the 1925 case of *Bateman* it was proclaimed that punishable negligence must display 'disregard for the life and safety of others,' an ambiguous statement which could be interpreted as requiring either objective fault or subjective fault on the part of the accused, depending on whether the term *disregard* requires awareness of a risk.<sup>41</sup> Post-*Bateman*, in some instances the judges explicitly used the term 'recklessness' to describe the fault element for manslaughter, often treating this as synonymous with 'gross negligence.'<sup>42</sup> In the case of *Seymour*<sup>43</sup> the House of Lords, confirming the approach taken in the earlier cases of *Caldwell*<sup>44</sup> and *Lawrence*,<sup>45</sup> determined that the requisite fault standard to be applied in cases of careless but unintentional killing was what could broadly be termed '*Caldwell* recklessness.'<sup>46</sup> The application of this test had the effect of significantly widening

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<sup>39</sup> R v Misra and Srivastava, above n.36 at para 62.

<sup>40</sup> Horder emphasises that, historically, judges were not preoccupied with categorising gross negligence as either a subjective or objective concept see J. Horder, 'Gross Negligence and Criminal Culpability' (1997) 47 (4) *University of Toronto Law Journal* 495, 497.

<sup>41</sup> See Baker, above n.6 at 513.

<sup>42</sup> *Andrews v DPP* [1937] AC 576 at 583; *R v Larkin* [1943] 1 All ER 217 at 219; *R v Cato* [1976] 1 WLR 110 at 114 and 115, and again at 119C; see also *R v Lamb* [1967] 2 QB 981 at 990.

<sup>43</sup> *R v Seymour* [1983] 2 AC 493.

<sup>44</sup> *R v Caldwell* [1982] AC 341.

<sup>45</sup> *R v Lawrence* [1982] AC 510.

<sup>46</sup> In other words, a person was reckless if: '(1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it,' see *R v Caldwell*, above n.44 at 354.

the category of manslaughter on the basis that mere inadvertence to risk would suffice for a conviction, it being no defence that the inadvertence was not sufficiently gross to warrant liability. This unsustainably expansive judicial interpretation of the fault condition was revisited in the case of *Adomako*, in which the House of Lords determined that the negligence requirement was objective and that the negligence had to be so gross that a risk of death would have been obvious to reasonable person in the accused's circumstances.<sup>47</sup> Lord Mackay suggested that the use of the term 'reckless' in the context of this category of manslaughter was acceptable, though the term should be given its ordinary meaning.<sup>48</sup> He also endorsed the interpretations of recklessness provided in *Stone*<sup>49</sup> and *West London Coroner, Ex parte Gray*;<sup>50</sup> defendants are reckless if they appreciate a risk and decided to run it,<sup>51</sup> or if they are indifferent to a risk.<sup>52</sup> Aside from these relatively brief allusions, there appears to have been a general reluctance to elaborate on the meaning of gross negligence in the leading case of *Adomako*. What is clear from a fleeting discussion of the seminal cases is that although the defendant's subjective state of mind can be relevant to an assessment of their gross negligence, it is not a pre-requisite for conviction; the focus of the offence is on the wrongfulness of the conduct and, consequently, inadvertence may be punished.<sup>53</sup>

It is clear from the preceding analysis that gross negligence and recklessness are two 'very closely connected'<sup>54</sup> concepts that the courts have often used interchangeably in the context of gross negligence manslaughter. Hence, in its current form gross negligence manslaughter is sufficiently broad to encapsulate a wide range of advertent and inadvertent risk-takers. Supporters of a more objective approach to determining criminal liability for manslaughter would not find the lack of concern with the defendant's subjective state of mind objectionable. However, if one subscribes to the subjectivist view of criminal liability defended here - that conscious choices to harm or risk harm to others are the benchmark of criminal liability for serious offences - the distinction between conscious risk-takers (who it will be argued may be legitimately punished) and inadvertent risk-takers (in respect of whom the imposition of criminal liability is more contentious) becomes central.

#### *Degrees of awareness: distinguishing advertent and inadvertent risk-takers*

It is often assumed that the dividing line between negligence and recklessness is clear-cut,<sup>55</sup> with negligence simply requiring the 'inadvertent creation of unreasonable risks,'<sup>56</sup> and recklessness requiring the conscious taking of said risks.<sup>57</sup> But rudimentary assertions that any shred of awareness automatically infers recklessness on the actor's part (and therefore denies the presence of negligence) may be vulnerable to challenge. Similarly, there may be

<sup>47</sup> R v Adomako, above n.22 at 187.

<sup>48</sup> Ibid. at 187-188.

<sup>49</sup> R v Stone [1977] QB 354.

<sup>50</sup> R v West London Coroner, Ex parte Gray [1988] QB 467.

<sup>51</sup> This encapsulates the current definition of recklessness, as confirmed by the House of Lords in R v G and another [2004] 1 AC 1034 at 1057 (per Lord Bingham): A person is reckless if 'with respect to—(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.'

<sup>52</sup> See also the earlier judicial pronouncements of Lord Taylor in R v Prentice [1993] 3 WLR 927 at 937, which support this interpretation of the relevant states of mind.

<sup>53</sup> See also Attorney-General's Reference (No 2 of 1999) [2000] QB 796 at 809, where Rose LJ confirmed that state of mind is not a pre-requisite to a gross negligence manslaughter conviction.

<sup>54</sup> See Quick, above n.33 at 199.

<sup>55</sup> Jerome Hall, a distinguished opponent of negligence liability, once remarked: 'no matter how difficult it may be in particular cases to determine whether the defendant was reckless or negligent, there is a hard impenetrable wall that separates them,' see J. Hall, *General principles of criminal law* 2<sup>nd</sup> edn (Indianapolis: Bobbs-Merrill Co, 1947) 116.

<sup>56</sup> See Alexander and Kessler-Ferzan, above n.28 at 69.

<sup>57</sup> See the definition of recklessness which derives from the House of Lords decision in R v G and another [2004] 1 AC 1053, reproduced above at n.51.

cases that have typically been regarded as involving negligence which could, in fact, be more plausibly described as cases of recklessness, such as Husak's example of defendants who were, at some point, aware of a risk but subsequently forgot about its existence.<sup>58</sup> As alluded to above, judicial acceptance of the all-embracing concept of gross negligence perhaps reveals a disinclination to explore in detail more peripheral cases of advertence such as these.<sup>59</sup> Whilst an exhaustive analysis of the relationship between recklessness and negligence is not possible within the confines of this paper,<sup>60</sup> if it is to be convincingly argued that the punishment of negligent defendants is not acceptable and that manslaughter convictions should be reserved only for defendants who have recklessly caused death, there is a need for further debate about the degree of awareness that is required before the accused can be described as a reckless, consciously aware risk-taker.

The difficulty of determining the requisite degree of awareness to justify a homicide conviction is illustrated by the case of Honey Rose. The optometrist was no doubt generally aware that failure to carry out appropriate eye examinations could result in potentially fatal illnesses going undetected, but this thought may not have consciously occupied her mind at the time of her fatal error. In order to categorise a defendant as reckless, that is, as having consciously adverted to a risk of causing harm, there is debate about the degree of phenomenological awareness that is required; would a vague, background awareness of the attendant risks suffice (for example a general subconscious awareness of the risks to patients of an improper ophthalmic assessment), or is something more occurrent required (such as an overt thought that 'my patient could die if I do not carry out his eye examination appropriately')? Moore and Hurd suggest that there is a 'threshold of vividity that divides recklessness from negligence, although it is a sliding scale threshold'<sup>61</sup> which implies the difficulty of drawing a clear dividing line between the concepts of advertence and inadvertence. A defendant may exhibit a conscious, occurrent awareness of a risk (that is, a belief that occupies their mind at the time of the conduct); this sort of operational awareness is indisputably reckless and consequently worthy of criminal punishment. It is also arguable that cases of what has been described as 'willful blindness' are morally equivalent in the sense that the actor adverted to the risk of death by acknowledging its existence but subsequently chose to turn a blind eye to the acknowledged risk of death.<sup>62</sup> Recklessness may also be the label applied to those who display a state of mind that Moore and Hurd label 'cognitive dissonance'; that is, where the mind of the actor has created a tension in respect of the riskiness of their conduct to the extent that the actor believes there is a risk but has ruled out its existence.<sup>63</sup> It is accepted here that such actors have adverted to the risk and are consequently reckless and therefore worthy of criminal punishment.

But does it necessarily follow that actors who have *any* notional awareness of the risks associated with their conduct are deemed reckless? A defendant may have a pre-conscious<sup>64</sup> or latent<sup>65</sup> awareness of the risk of causing harm to others; for example, we are all generally aware of the potential threat to life when leaving babies unattended in baths, or leaving children locked in cars for prolonged periods of time in high temperatures, even if that awareness is not at the forefront of our minds all of the time, for example, because we have forgotten about the risk or have been distracted by an emergency. This type of pre-conscious

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<sup>58</sup> See Husak, above n.7 at 199-200.

<sup>59</sup> Husak, *ibid.* at 201, describes the lack of clarification of the two concepts as 'puzzling' and, at 207, pronounces the lack of academic consideration of the nature of awareness as 'scandalous.'

<sup>60</sup> See generally Husak, *ibid.* at 199-218 for a detailed illumination of the complex issues raised by this debate.

<sup>61</sup> Moore and Hurd, above n.5 at 153.

<sup>62</sup> *Ibid.* at 154.

<sup>63</sup> *Ibid.* at 155.

<sup>64</sup> This phrase is adopted by Moore and Hurd, *ibid.* at 153-154.

<sup>65</sup> This is the term used by Duff, see RA. Duff, *Intention, Agency and Criminal Liability* (Oxford: Basil Blackwell, 1990) 159-161. Colvin adopts the label 'experience of risk' to describe the same concept, see E. Colvin, 'Recklessness and Criminal Negligence' (1982) 32 *University of Toronto Law Journal* 345, 361.



awareness of risk straddles the borderline between recklessness and negligence, since there is no unequivocal indication of either advertence or inadvertence on the actor's part. Some pre-conscious beliefs may give rise to a degree of advertence. For instance, if a defendant is aware of general risks associated with the performance of their job as a professional - for example, a doctor, electrician, or, indeed, an optometrist - they may have a persistent conscious inkling of the potential risk of death associated with their conduct that could rightly be described as conscious awareness.<sup>66</sup> But, in other circumstances, an actor may have a pre-conscious awareness of risk that does not form part of their practical reasoning process at all; that is, they lack any *conscious inkling* of the risk, and so we might still describe these as cases as exhibiting negligence.

The term 'negligence' may also be employed to describe cases in which it simply does not occur *at any point* to the accused that their conduct has created a risk of death.<sup>67</sup> A lack of any sort of awareness of a risk of death - conscious or latent - may arise in a number of circumstances. For example, there may be cases in which an actor desires that their conduct does not pose a risk to others and this wish underscores their belief that there is no risk when such risk does, in fact, exist. For Moore and Hurd, these 'wishful thinkers' are wholly inadvertent (negligent) actors<sup>68</sup>. Moore and Hurd also usefully categorise as 'self-deception' cases in which an actor has a desire not to know about a risk which creates a belief that there is no risk; such a defendant has actively prevented himself from being aware of the risk but, unlike an actor who is 'willfully blind', the self-deceiver has no conscious suspicion that a risk exists and so can be said to be acting inadvertently.<sup>69</sup> Finally, there may be cases of simple inadvertence, or 'true negligence',<sup>70</sup> where the defendant has no conscious awareness of a risk and lacks any suspicion that a risk may exist. The criminal prosecution of this type of negligent conduct is particularly contentious.

Although this is undeniably a gross oversimplification of some very complex issues, the tentative conclusion that may be drawn thus far is that there is a discernible dividing line between cases of recklessness and negligence, albeit a 'fuzzy'<sup>71</sup> one which has divided opinion amongst distinguished academics.<sup>72</sup> It is proposed that in cases of conscious, occurrent awareness of a risk of harm to others, willful blindness or cognitive dissonance in respect of such a risk, the actor's conscious awareness is sufficient to warrant an accusation of recklessness. The term 'recklessness' will also be used in the traditional sense to describe defendants who have consciously adverted to risks and it will also be adopted to describe cases where awareness of the risk is not at the forefront of the defendant's mind at the time of the fatal incident, but where she has a conscious inkling of the existence of a risk. The term 'negligence' will be reserved for cases where there is a genuine lack of awareness of the risk of death, because the actor has no conscious belief in, or conscious inkling of, its existence, whether that was because of her own wishful thinking, self-deception, or simple inadvertence. It is hoped that this (admittedly superficial) explanation of what constitutes a 'negligent' as opposed to a 'reckless' defendant provides a more stable foundation for the subsequent discussion of whether gross negligence that results in death warrants a stigmatic manslaughter conviction. The contention that inadvertent defendants who genuinely lack either conscious awareness or conscious inkling of the risks posed by their conduct should not be subject to criminal punishment can now be addressed.

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<sup>66</sup> Or 'advertent negligence' as Moore and Hurd describe it, above n.5 at 149.

<sup>67</sup> See Husak, above n.7 at 201.

<sup>68</sup> See Moore and Hurd, above n.5 at 155.

<sup>69</sup> Ibid. at 155-156.

<sup>70</sup> To use the phrase coined by Husak, above n.7 at 201.

<sup>71</sup> See Moore and Hurd, above n.5 at 156.

<sup>72</sup> In light of the difficulties of distinguishing the concepts of recklessness and negligence, it has been suggested perhaps a third state of mind should be added to cater for the 'in-between' cases, or that some alternative means of distinguishing manslaughter from misadventure should be employed (see Husak, above n.7 at 217).

## To what extent should inadvertence be punished?

If a defendant lacks any relevant awareness (in the sense described above) of the risk of death at the time of the fatal conduct, does it follow that the defendant's negligence should be punished? There may be a multiplicity of reasons why a competent person does not advert to a risk in a particular situation.<sup>73</sup> Negligence can arise in situations where the defendant does not demonstrate sufficient concern for others. This lack of care may be manifested, for example, in the accused's bad attitude towards others or where the defendant is distracted by his own selfish gains; moral and legal blameworthiness in such circumstances may seem intuitively appropriate. But the reach of gross negligence manslaughter extends much further than this: the resultant death may have been caused by someone who has genuine concern for the interests of others and is a person of exemplary character, but who has, for example, made a devastating mistake or has simply forgotten about the potential risks associated with their conduct. It follows that the blameworthiness of some negligent actors and the suitability of a gross negligence manslaughter conviction is questionable.<sup>74</sup> If this concession is accepted, there needs to be a more principled means of determining the lower limits of manslaughter that satisfies our intuitions about moral blameworthiness and criminal culpability. To achieve a more principled rationale, attention should be focused on the reasons why particular defendants may not have adverted to the risk of causing harm to others in order to ascertain whether these explanations are sufficient to justify the imposition of criminal responsibility.

*Punishment should be predicated on conscious choices to risk causing harm to others:*

When exploring morally relevant reasons for the imposition of criminal culpability theorists frequently base their individually nuanced arguments on one of two general theories of moral blameworthiness. The first - 'character theory' - is premised on the idea that a blameworthy state of mind is required for the imposition of criminal liability because it enables us to infer from the wrongful act a character trait that deserves criminal punishment.<sup>75</sup> The alternative 'choice theory' similarly insists that blame is essential to criminal punishment, but proposes that such blame is only justified if the agent could have chosen otherwise than he did.<sup>76</sup> Indeed, the moral blameworthiness and consequent criminal punishment of an actor who makes a conscious and unconstrained choice to risk harm to others is uncontroversial for both theoretical approaches, since the actor consciously opted to take unnecessary risks and this is the most obvious manifestation of an undesirable character. But the fact that the law maintains that conscious advertence is not a necessary condition for the imposition of criminal liability is much more contentious, whichever line of philosophical argument is pursued.<sup>77</sup> Either of these general philosophies could be engaged to undermine the case for punishing negligence. In summary, choice theorists would argue inadvertent defendants have not consciously risked harming others and thus there is no scope for punishing negligence.

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<sup>73</sup> The potential reasons for lack of awareness are discussed in more detail in S. Garvey, 'What's Wrong with Involuntary Manslaughter?' (2006) 85 *Texas Law Review* 333, 351-352.

<sup>74</sup> Even advocates of liability for negligence concede that, in some circumstances, the criminal censure of certain forms of negligence, such as momentary negligent mistakes, can be difficult to justify, as highlighted by Alexander and Kessler Ferzan, above n.28 at 71.

<sup>75</sup> Versions of character theories have been proffered G. Fletcher, 'The theory of criminal negligence: A comparative analysis' (1971) 119 *University of Pennsylvania Law Review* 401; and V. Tadros, *Criminal Responsibility* (OUP: Oxford, 2005).

<sup>76</sup> Notable proponents include M. Moore, *Placing Blame: a General Theory of the Criminal Law* (Oxford University Press, 2010) and J. Hall (1963) 'Negligent behavior should be excluded from penal liability,' (1963) 63 *Columbia Law Review* 632. As well as culpability being justified on the basis of conscious choices made by the actor, HLA Hart developed a theory that culpability may derive from an 'unexercised capacity;' in other words, inadvertence can be culpable if the accused had the capacity and fair opportunity to act in a non-negligent manner and did not, see HLA Hart, *Punishment and Responsibility* 2<sup>nd</sup> edn (Oxford University Press, 2008) 136-157.

<sup>77</sup> Duff, above n.65 at 163; CMV. Clarkson, above n.16 at 154-156.

Character theorists might argue that since defective character is the basis of criminal punishment certain negligent defendants who are of generally good character and have caused death, for example, through a one-off lapse of skill or attention, do not deserve criminal punishment.<sup>78</sup> Whilst a sophisticated analysis of these conflicting theories is beyond the scope of the present inquiry, the arguments defended below render it intuitively more plausible to contend that no matter how reprehensible or deficient an actor's character may be, absent any conscious awareness of risk the punishment of inadvertent actors is not justified.

There has been something of a modern resurgence in support for subjective approaches to determining criminal liability whereby criminal prohibition is restricted to those who have consciously chosen to harm others or risk causing harm to others.<sup>79</sup> Choice theories, in their various guises, have, however, been criticised for their often unconvincing conflation of moral blameworthiness and criminal guilt and their consequent failure to explain exactly why moral blameworthiness should lead to criminal conviction.<sup>80</sup> In order to address this weakness, Brudner constructs a legal (rather than purely moral) account of *mens rea* which seems more resistant to familiar criticisms aimed at choice theories.<sup>81</sup> He cogently argues that moral blameworthiness does not always correspond with criminal fault; because criminal punishment has the capacity to violate the accused person's rights of agency there must be a *legal* sense of culpability rather than a mere *moral* stance on culpability. This specifically *legal* fault can only be established, he contends, if the accused has made a conscious choice to interfere with the agency of another, or to risk such interference; these choices make the defendant vulnerable to criminal punishment because the punishment is 'self-willed by the criminal and so consonant with his inviolability.'<sup>82</sup> Using this persuasive thesis as a backdrop, it will be argued that the existing offence unjustifiably stretches the boundaries of criminality by extending liability beyond those who consciously adverted to risks. In order to advance this argument, it is important to consider the reasons why risks were not adverted to in a variety of negligence cases. It will be argued that none of the reasons for inadvertence are sufficiently blameworthy (from a moral and legal perspective) to justify criminal conviction, a conclusion which supports the contention that nothing less than conscious choices to risk harm will suffice for criminal culpability.

#### *Reasons for inadvertence:*

In order to examine whether inadvertent defendants are liable to punishment for defects in their conduct that produce fatal consequences, reliance will be placed on a 'taxonomy of flaws in practical rationality,'<sup>83</sup> developed by Moore and Hurd. The authors usefully catalogue the reasons why an actor may not have adverted to risks and this provides a valuable framework for the present discussion. Four predominant flaws of practical rationality that could prevent an actor from perceiving risks are identified: selfishness (bad motivation), stupidity (cognitive ineptitude), weakness of will (conative defects) and clumsiness (deficient motor control).<sup>84</sup> It is useful to explain these categories in outline as they provide an important basis for exploring the extent to which defects are sufficiently blameworthy to warrant criminal punishment.

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<sup>78</sup> H. Smith, 'Non-Tracing Cases of Culpable Ignorance' (2011) 5 *Criminal Law and Philosophy* 115, 144.

<sup>79</sup> See Quick, above n.8 at 423.

<sup>80</sup> See the detailed discussion in A. Brudner 'Subjective Fault for Crime: A Reinterpretation' (2008) 14 *Legal Theory* 1, 16.

<sup>81</sup> Ibid. at 2.

<sup>82</sup> Brudner argues that: 'the only choices to which a denial of rights of agency is imputable are choices to interfere or to risk interfering with another agent's capacity to act on his or her own ends and choices to break the law,' *ibid.* at 38.

<sup>83</sup> See Moore and Hurd, above n.5 at 166.

<sup>84</sup> Ibid.

Starting with arguably the least culpable source of inadvertence, the authors refer to 'clumsiness' as 'poorly developed fine motor control',<sup>85</sup> which can give rise to a lack of conscious awareness of risks. Next, they identify a vast array of 'cognitive' deficiencies ('stupidity') that could result in lack of conscious awareness, such as disorders that result in a very short attention span, conditions giving rise to memory lapses, or people being slow to draw inferences about the risks underlying their conduct.<sup>86</sup> An actor may alternatively be possessed of 'conative' deficiencies; they may be able to draw accurate inferences about risks that cognitively deficient actors cannot, but they are not sufficiently strong-willed to avoid taking those risks.<sup>87</sup> The final group of personal deficiencies that may lead to a lack of awareness are motivational flaws, whereby an agent does not advert to risks because s/he displays bad character traits such as selfishness, pride or indifference.<sup>88</sup> The intuitively appealing conclusion is that, so defined, motivational and conational defects are rightly the subject of moral condemnation, whereas clumsiness and cognitive ineptitude are flaws that do not inevitably attract moral criticism.<sup>89</sup> Selfish, indifferent or weak-willed individuals, for example, would instinctively deserve moral blame, whereas stupid, forgetful, clumsy individuals would not generally provoke such a condemnatory moral response.

Assuming it to be true that certain personal deficiencies are morally condemnable, to what extent should an agent be criminally punished for causing inadvertent harm to others as a result of these manifest deficiencies? The sources of inadvertence identified as potentially relevant to a charge of gross negligence manslaughter will be collapsed into two distinct categories for the purposes of the remaining discussion: negligence caused by deficiencies in attitude (that is, conational and motivational flaws) and negligence caused by deficiencies of knowledge, skill and attention (that is, clumsiness and cognitive ineptitude).<sup>90</sup> The defensibility of criminalising both of these broad types of negligence will be considered in turn, and it will be established that the only justifiable circumstances in which criminal liability can be imposed is where the defendant has made a conscious choice to either cause a proscribed harm or risk causing it, regardless of the moral dubiousness of the reasons for their inadvertence.

#### *Punishing deficiencies in attitude:*

In an attempt to counter 'choice' theories which refute liability for negligence on the basis that inadvertent defendants do not consciously choose to risk causing harm to others, a number of philosophers have argued that what renders a defendant sufficiently blameworthy to justify punishment is their attitude of indifference to the legally protected interests of others.<sup>91</sup> Indifference is arguably an attractive alternative *mens rea* concept on which liability for at least some forms of gross negligence manslaughter could be constructed. Horder defines indifference as the demonstration of a 'cavalier' or 'uncaring' attitude towards the victim's protected interests,<sup>92</sup> and a preoccupation with indifference leaves open the possibility for punishment of at least some inadvertent defendants. Duff suggests, for example, that it is legitimate to punish a person who has capacity but fails to advert to an obvious and serious risk because the lack of thought is demonstrative of an attitude of

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<sup>85</sup> Ibid. at 167.

<sup>86</sup> Ibid. at 167-168.

<sup>87</sup> Ibid. at 168.

<sup>88</sup> Ibid. at 168-169.

<sup>89</sup> Moore and Hurd also consider in more detail the imposition of liability in so-called 'tracing' cases, where the defendant's deficiencies were, at an earlier point in time, culpably caused (for example, forgetfulness caused by voluntary drug abuse) or where an agent is consciously aware of their condition and disregards the consequences of their conduct, see *ibid.* at 179-180.

<sup>90</sup> A similar two-tier approach to the categorisation of negligence is adopted by Horder, above n.40.

<sup>91</sup> See, for example, Horder, above n.40, Duff, above n.65, CMV Clarkson, above n.16, and KW. Simons, 'Culpability and Retributive Theory: The Problem of Criminal Negligence' (1994) 5 *Journal of Contemporary Legal Issues* 365.

<sup>92</sup> Horder, above n.40 at 501.

practical indifference; this may be inferred from the fact that their conduct involved a substantial departure from an expected standard. He contends that such actors can be subject to moral condemnation and resultant criminal sanction, regardless of the circumstances that provoked the inattention.<sup>93</sup> However, this reliance on practical indifference as a means of sifting out the culpable from the nonculpable produces an over-inclusive test; it has the potential to criminalise negligent actors, irrespective of whether their negligence is gross, simply because they demonstrated attitude of indifference to the victim's protected interests.<sup>94</sup> Duff acknowledges this potential for over-inclusivity by attempting to distinguish the practically indifferent actor from the grossly negligent actor by claiming that the former does not care about the interests of others and is thus liable to punishment, whereas the latter merely undervalues the interests of others because of a preoccupation with their own ends and should thus not be subject to criminal prohibition.<sup>95</sup> This argument does not withstand the criticism that there is no real qualitative distinction between these two attitudes sufficient to warrant different treatment from the criminal law;<sup>96</sup> hence Duff's theory seems unappealing.

In response to these criticisms and in an attempt to offer a more defensible theory of practical indifference, Horder distinguishes between actors who are 'weakly' and 'strongly indifferent.' A weakly indifferent actor is one who considers the protected interests of the victim in their reasoning process but demonstrates insensitivity to those interests since ultimately their reason for action is dictated by their own agent-specific concerns.<sup>97</sup> In contrast, a strongly indifferent actor, although similar to her 'weak' counterpart in that the pursuit of her own ends overshadows her concern for others, demonstrates a degree of blameworthiness that is more worthy of criminal censure because she would completely disregard the protected interests of others even if she became aware of them.<sup>98</sup> Unlike the weakly indifferent actor, she would not alter her course of conduct on account of this knowledge. Horder contends, therefore, that only strongly indifferent actors warrant criminal conviction.<sup>99</sup> Whilst this has been described as a 'valiant' attempt to surmount the problems pervading Duff's proposition, there remain some significant flaws with any theory which bases liability for negligence on the indifferent attitude of the actor.<sup>100</sup>

One of the main reasons for the unsustainability of arguments for the punishment of indifference is that it is inappropriate to base culpability judgements on bad character. It must be noted that Horder and Duff refute the contention that a theory of practical indifference hinges on an assessment of the agent's character; they call for a focus on whether a particular *action* manifests indifference, and dismiss criticisms that indifference theories make any claims about a person's character, with which they accept the law is not concerned.<sup>101</sup> The force of this argument is, however, undermined by Brudner's contention that an attitude of strong indifference cannot be automatically inferred from conduct alone; to determine liability one would have to ask whether the *actor* totally disregarded the victim's interests.<sup>102</sup> This inquiry necessarily depends on an assessment of the actor's character and not his culpability for the act itself (which was not advertently chosen). So interpreted, the theory of practical indifference can then be subject to the same criticisms as any other theory which is premised on the defendant's character.

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<sup>93</sup> This theory is derived from the premise that the blameworthiness of indirectly intentional agents can be traced to their attitude of indifference to the victim's interests, see Duff, above n.65.

<sup>94</sup> Brudner, above n.80 at 35-37.

<sup>95</sup> Duff, above n.65 at 164-165.

<sup>96</sup> Brudner, above n.80 at 35-36.

<sup>97</sup> Horder, above n.40 at 502-503.

<sup>98</sup> Horder, *ibid.* at 503-504.

<sup>99</sup> *Ibid.*

<sup>100</sup> Brudner, above n.80 at 36.

<sup>101</sup> Horder, above n.40 at 505-506; see also generally Duff, above n.65.

<sup>102</sup> Brudner, above n.80 at 36-37.

Character theories of *mens rea*, which dictate that criminal punishment is justified when an agent has performed an unlawful act revealing a disposition of character that warrants moral condemnation, are arguably unsustainable. Moore and Hurd emphasise the incompatibility of punishing bad character and adhering to the rule of law requirements of clarity, consistency, predictability and prospectivity, which protect broader liberal values of liberty, fairness and equality.<sup>103</sup> Political liberalism, a philosophical theory with which many subjectivist theories are aligned, demands that the state exercises its power within the confines of a system that allows citizens maximal equal liberty to pursue their own conceptions of the good life;<sup>104</sup> but there is no universal agreement about what constitutes the 'good.' If criminal punishment is predicated on flawed character traits, then in order to ensure consistency and clarity character traits would presumably have to be ranked in terms of their relative culpability; but it is surely impossible to determine a rank ordering of vices as people might reasonably disagree about what constitutes a vice in accordance with their own perceptions of a good life. The relative blameworthiness of any character flaw is context-dependent and case-specific.<sup>105</sup> This argument is supported by Brudner who concurs that 'the character theory requires distinctions among mental attitudes much finer than the criminal law typically recognizes.'<sup>106</sup> Allied to this contention, theories that are reliant on bad character as a means of justifying punishment do not adequately explain why, if moral character is a significant determinant of criminal liability, the courts are generally reluctant to equate motive with criminal fault.<sup>107</sup>

It is suggested that supporters of culpability for inadvertence where the defendant displays bad character traits must overcome more profound moral paradoxes engendered by their position.<sup>108</sup> Character theories do not adequately explain why we do not punish for bad character itself, irrespective of whether this character is manifested in wrongful action.<sup>109</sup> In addition, such theories do not satisfactorily explain why punishment is meted out to those who are acting out of what is otherwise an enduringly good moral character when committing an intentional crime; surely the theory would permit evidence of an otherwise good moral character to absolve criminal fault, a conclusion that is unsustainable when there is no doubt that intentional actors are criminally responsible for their deliberate wrongdoing, no matter how virtuous their conduct in the normal course of events.<sup>110</sup> Even if we were to accept that certain character traits are socially undesirable and deserving of moral blame, it does not inevitably lead to the conclusion that criminal censure is justified.<sup>111</sup>

These significant misgivings about the plausibility of theories of culpability which punish defects in attitude categorically preclude the possibility of using them as a basis to determine the lower limits of manslaughter. As Brudner persuasively contends, 'however obnoxiously narcissistic [the defendant's] character may be in being oblivious to the important interests of others,'<sup>112</sup> absent a conscious choice to run the unreasonable risk of encroaching on the protected interests of another the defendant cannot be denied their own rights of agency through the imposition of criminal punishment. The only legitimate reason for punishing deficiencies of attitude is when such flaws are manifested in conscious choices to risk causing

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<sup>103</sup> Moore and Hurd, above n.5 at 173-174.

<sup>104</sup> See John Rawls' defence of this political conception in J. Rawls, *Political Liberalism* (Columbia University Press: New York, 1993).

<sup>105</sup> Moore and Hurd, above n.5 at 173-174.

<sup>106</sup> Brudner, above n.80 at 8.

<sup>107</sup> Brudner, above n.80 at 9.

<sup>108</sup> Discussed by Moore and Hurd, above n.5 at 174-176 and Alexander and Kessler Ferzan, above n.28 at 78-79.

<sup>109</sup> Moore and Hurd, above n.5 at 174-176.

<sup>110</sup> Ibid. at 175-176.

<sup>111</sup> As Brudner highlights, there are a number of other ways to express society's moral condemnation of flawed character e.g. through professional discipline and social snubbing, above n.80 at 10-11.

<sup>112</sup> Ibid. at 35.

harm to others, rendering advertent recklessness the appropriate mechanism to determine criminal fault.<sup>113</sup> But, in order to complete the picture, the desirability of punishing other cases of negligence must be considered, in particular, wrongs that are the 'product of uncharacteristic and unpredictable inadvertence,'<sup>114</sup> such as one-off mistakes or lapses of concentration. Such instances of free-standing negligence truly test the boundaries of criminal culpability.

*Punishing inattention or failure to advert to an obvious and serious risk:*

It has thus far been argued that deficient attitudes towards the legally protected interests of others do not supply good enough reasons for criminal punishment, absent any conscious awareness of the risk of intruding on those interests. Worthy of additional scrutiny are cases where a defendant failed to advert to an obvious and serious risk and that failure was caused by a deficiency of knowledge, skill or attentiveness.<sup>115</sup> For the reasons considered above, orthodox subjectivists would find the punishment of defendants who failed to appreciate any risks entailed by their conduct intolerable, no matter how morally condemnable their attitude to others, and even in situations where a reasonable person in the accused's situation would have appreciated an obvious and serious risk of death.<sup>116</sup> The subjectivist standpoint has, however, been subject to alternative interpretations that could leave open the possibility of punishing negligence when a defendant's inadvertence constitutes a violation of well-established rules of conduct.

One such interpretation is offered by Horder. Adopting what he calls the 'practical reasoning theory of subjectivism,'<sup>117</sup> Horder concurs with the earlier assertion that criminal culpability is defensible where a defendant either knows of a risk, or at least suspects that a risk exists despite the existence of contrary reasons which should have dissuaded the actor from engaging in the conduct.<sup>118</sup> In other words, as discussed earlier, if latent knowledge featured in the accused's assessment of the risk then she had, at the very least, an inkling of the risk involved and thus can be legitimately punished. However, Horder argues that this most persuasive theory of subjectivism paradoxically carves out a role (albeit a limited one) for liability based on inadvertence. He contends that while risk-taking is *predominantly* about balancing reasons for and against action, there are some situations in which the taking of risks should automatically be ruled out.<sup>119</sup> For example, doctors are always required to act in the best interests of their patients; Horder's contention is that there can be no balancing of reasons for and against action in such circumstances, and therefore this version of subjectivism cannot provide a plausible theoretical explanation as to why, in his view, a defendant should be punished.<sup>120</sup> Instead, where one has voluntarily undertaken a duty to another (e.g. doctor to patient, reciprocal duties owed by road users) in circumstances where there are clear and stringent standards governing conduct, Horder argues it is entirely appropriate to judge the extent of a departure from such a duty from an objective perspective.<sup>121</sup> Moore and Hurd recognise that there are some rules of conduct which are so fundamental to the effective functioning of daily life (and the avoidance of serious harm or death) that an actor's choice to violate them is commonly thought to justify criminal liability, irrespective of the fact that they did not advert to the possible consequences of the rule violation.<sup>122</sup> It may be contended that the actor's fault is predicated on their conscious choice

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<sup>113</sup> Alexander and Kessler Ferzan claim it is difficult to see how this lack of sufficient concern for others can manifest itself otherwise than by way of a culpable conscious choice by the actor, see above n.28 at 75.

<sup>114</sup> Moore and Hurd, above n.5 at 185.

<sup>115</sup> This useful categorisation of deficiencies is suggested in Horder, above n.40 at 509-510.

<sup>116</sup> See the broad thesis defended by Brudner, above n.80.

<sup>117</sup> Which he describes as 'the soundest theory of subjectivism,' see Horder, above n.40 at 515.

<sup>118</sup> Ibid. at 512.

<sup>119</sup> Ibid. at 514.

<sup>120</sup> Ibid. at 514-515.

<sup>121</sup> Ibid. at 516-517.

<sup>122</sup> Moore and Hurd, above n.5 at 186-191.

to violate the important rule of conduct and, as long as that violation caused the prohibited harm, then the imposition of punishment is warranted. Whilst there is some merit in this approach in that it acknowledges the fatal consequences caused by the conduct, it seems the outcome (death) is unacceptably prioritised over principled reasons for imposing liability. The punishment of an agent who does not advert to the risks associated with their rule violation departs too much from subjectivist ideals to be acceptable. In cases where the actor has genuinely not adverted to the attendant risks, even if there are well-established conduct-guiding rules that should have alerted them, and even where a reasonable person in their position would have been aware of them, it seems intuitively unjust to invoke criminal censure that would, in turn, expose the actor to an infringement of their own rights of agency. However, there is an important qualification here: often the choice to violate a clear and well-established rule must entail at least some conscious inkling of the attendant risks.<sup>123</sup> If it can be established that there was some form of advertence in respect of the risks, however latent that awareness may have been, then criminal punishment is defensible.

In cases where an actor has negligently caused death and there are no well-established rules to dictate the standard of conduct that we can reasonably expect, it is impossible to determine in any consistent way whether conduct is 'bad enough' to be criminal.<sup>124</sup> If there is no advertence to risk at all (whether that be vivid awareness or preconscious awareness that features in the defendant's practical reasoning processes, and regardless of the existence of established rules), then there is no defensible philosophical grounding for a criminal conviction for gross negligence manslaughter. According to Moore and Hurd, 'parents who in no way adverted (in any sense, to any degree, at any level of generality, at any time) to the deadly risk posed by bad odor coming from their child's mouth, may face criminal liability when their child loses his life to gangrene.'<sup>125</sup> The potential for a conviction as serious as manslaughter to arise in these circumstances marks an unacceptable blurring of the boundary between criminal culpability and misadventure. The fact that the victim's legally protected interests have been set back by the actor's conduct can be remedied, to an extent, by resort to the civil law; but there has been no wrongful setback to the interests of the victim sufficient to justify criminal punishment. To restate Brudner's standpoint, judicial punishment is justified and criminal guilt deserved when the accused chooses to interfere with the victim's agency; the criminal law metes out legitimate public vindication in order to acknowledge that fact that the defendant has violated V's sphere of liberty.<sup>126</sup> Intrusions into the legally protected sphere of liberty of others only warrant punishment when it can be said that the accused, taking into account their subjective knowledge and perceptions about the circumstances and consequences of their conduct, has made a choice to interfere with victim's agency. It follows that where the accused has no awareness of the potential risk of harm to others, whether through his lack of attentiveness, forgetfulness or mistake, the imposition of punishment is unjustifiable. Indeed, punishment itself would be an example of 'external violence' against which the actor should be protected.<sup>127</sup>

In summary, where a defendant runs a serious risk of intruding on the legally protected rights of the victim, that risk is only chosen when D is consciously aware of its (actual or suspected) existence and thus D must foresee the potential for intrusion to be criminally liable for it. An inadvertent defendant, wholly unaware of the risk (even one that would be immediately apparent to a reasonable observer in circumstances where conduct-guiding rules are established) does not make such a choice and thus does not render themselves vulnerable to criminal conviction. It follows that even if a defendant breaches a well-established rule of which she is aware and that breach causes death, unless she was either

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<sup>123</sup> This is acknowledged by Moore and Hurd, *ibid.* at 191.

<sup>124</sup> Even Horder concedes this point, see above n.40 at 519-520.

<sup>125</sup> Moore and Hurd, above n.5 at 195, referring to the facts of the American case *State v. Williams*, 484 P2d 1167 (Wash Ct App 1971).

<sup>126</sup> Brudner, above n.80 at 1-2.

<sup>127</sup> Brudner, above n.80 at 19.



occurently aware of the risk of intruding on the rights of the victim or she had some conscious inkling of the risks which featured in her thought process, she is not an appropriate candidate for criminal conviction.

*Acknowledging the practical difficulties of determining subjective fault:*

Thus far it has been established that gross negligence manslaughter offence is set upon unstable theoretical foundations which struggle to withstand subjectivist challenges. But if we are to reinforce philosophical claims that there should be a return to subjective recklessness as the benchmark of criminal liability for manslaughter, concerns about the practical difficulties associated with establishing subjective fault must be addressed.

There may be legitimate concern that demanding a narrower, subjective fault requirement for manslaughter may result in a drop in conviction rates as it is more difficult to prove advertence than it is to establish gross negligence. But recent research suggests that prosecutors are, in any case, reluctant to progress to trial cases where defendants have made catastrophic errors that have caused death, and are 'uneasy with the objective framing of the law...[and are]...instead searching for subjective fault.'<sup>128</sup> Empirical research, then, supports the conclusion that subjective fault provides a more consistent and principled basis on which to determine liability for serious homicide offences; it is, in effect, the yardstick by which prosecutors (and likely jurors) already make judgments about the feasibility of a gross negligence manslaughter charge.<sup>129</sup>

If subjective recklessness was embraced as the basis for determining manslaughter convictions, a final note should be made to address concerns about the practical difficulties of establishing an actor's subjective awareness of risks. In order to avoid a conviction for subjective reckless manslaughter defendants may claim to have given no thought to the obvious and serious risks associated with their conduct. But this denial of conscious awareness does not have to be accepted at face value. Honey Rose's case can be used to illustrate the point; if culpability is to be determined on the basis of the defendant's awareness of the risk of a rights-infringement then, even if the law was reformed, a manslaughter verdict could still be returned on the facts. The jury may disbelieve Rose's claim that she was unaware of any risk, given that her conduct departed significantly from standard practice, and so it may be hard to believe that she did not at least have some conscious inkling of the associated risks. On the other hand, if the jury are satisfied that her failure to carry out the examinations was simply the product of forgetfulness or a one-off lapse in concentration in an otherwise unblemished career, they may be minded to acquit – not on the basis of some nebulous concept of gross negligence but by relying on the more principled concept of subjective recklessness. The task of determining recklessness is one which jurors are required to undertake frequently in the context other criminal offences, so the difficulties of determining subjective fault are not unique to manslaughter. These arguments make the case for abolishing the existing gross negligence manslaughter offence and replacing it with subjective reckless manslaughter even more robust.

**Conclusion:**

This paper has explored and defended arguments that the lower limits of manslaughter are currently misplaced. It is submitted that the significant definitional problems besetting the gross negligence requirement are insurmountable; the reliance on the jury's instinct to determine the boundaries of criminality by reference to the standard of the reasonable person, and the lack of clarity about what constitutes negligence (as distinct from recklessness) provide sufficient reasons alone to revisit the offence. The absence of a defensible theoretical rationale to justify the punishment of inadvertent defendants drives the final nail into the coffin of gross negligence manslaughter.

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<sup>128</sup> Quick, above n.8 at 441 and 444.

<sup>129</sup> Ibid. at 444-445.

A more defensible offence rationale would demand that the manslaughter offence only captures those who have passed the subjectivist fault threshold for liability, in the sense that they consciously chose to interfere, or risk interfering, with the legally protected interests of others. Advertence is indisputably demonstrated where an actor has an operating or occurrent appreciation of the risk of a rights-infringement; but it may also be established in cases where the actor has a latent or experiential awareness of risks, provided this gives rise to at least a conscious inkling that a rights-infringement may materialise. In cases where clear and well-established rules have been breached by an inattentive defendant, the defendant's claim that they did not advert to the risk will be more difficult to believe; but if there is genuine inadvertence to risk, criminal punishment cannot be justified. The practical difficulties of determining whether a defendant has the necessary conscious awareness in any particular case are undeniable, but this challenge is not specific to manslaughter and may be resolved by resort to relevant evidence. In any case, the empirical research suggests that there is a tendency at prosecutorial level to prosecute only those who have displayed some conscious awareness of the risks associated with their conduct, and this lends further support to appeals to abandon reliance on the gross negligence condition.<sup>130</sup>

It is hoped that the arguments outlined above illustrate a pressing need to revisit the lower boundaries of the manslaughter offence to ensure that conscious awareness of the risk of harm to others serves as the limit of legitimate criminal culpability, beyond which punishment cannot be justified. Determining liability for such a serious offence on the basis of subjective recklessness is intuitively more appealing and theoretically more defensible than the vague and unprincipled approach legitimised by the existing gross negligence requirement, which is woefully lacking in clarity and consistency. The criminal law should demand that manslaughter cases on the cusp are decided on the basis of a principled rationale that is not unduly preoccupied with the unfortunate consequence of death at the expense of careful consideration of the defendant's culpability.

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<sup>130</sup> Quick, above n.8.